Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission Rules to Provide for the use of 220-222 MHz Band by the Private Land Mobile Radio Service	)	PR Docket No. 89-552
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION OR CLARIFICATION

INCOM COMMUNICATIONS CORPORATION
SEA, INC.
IN TOUCH SERVICES, INC.
PHILIP ADLER dba
COMMUNICATIONS MANAGEMENT COMPANY
AIRCOM COMMUNICATIONS, INC.

By: Robyn G. Nietert
David J. Kaufman
Their Attorneys

Brown Nietert & Kaufman, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
(202) 887-0600

March 4, 1996

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SUMMARY

By the Second Report and Order, FCC 96-27, released January 26, 1996 ("2nd R&O"), the Commission sought to establish a one-time license modification procedure for local Phase I licenses in the 220-222 MHz service. This Petition for Partial Reconsideration or Clarification ("Petition") seeks reconsideration or clarification of the 2nd R&O to include the following provisions in the procedure adopted for licenses seeking to modify their site locations:

1. A licensee seeking modification pursuant to Section 90.753(c)(2) of the Rules is required to have filed an STA request designating the modified site by January 26, 1996; however, such STA need not have been granted by that date.

2. A request for waiver of Section 90.753 of the Rules may be accompanied by an alternative site proposal (which may be the licensee's initially authorized site) which complies with Section 90.753 of the Rules and at which construction will be required within 45 days of the Commission's denial of the waiver request.

3. The maximum relocation distance limitation applicable to licensees located within 8 km of a DFA perimeter who seek to relocate outside the DFA is the 25 km maximum limitation, not the 8 km maximum distance limitation.

The Commission should reconsider these three issues to clarify their application to licensees who pursue modification of their existing facilities. Because the 2nd R&O provides a one-time modification window, it is essential that licensees be given notice of the exact application of the policies adopted in the 2nd R&O so that they are not subject to the draconian result of license termination for failing to properly interpret the implementation of the application modification rules. The clarifications requested

herein will ensure that the 2nd R&O is applied as the Commission intended. The clarifications requested herein can be accomplished within the four corners of the existing 2nd R&O by Commission staff pursuant to delegated authority and utilizing administrative procedures. Clarification in this manner would moot the reconsideration sought herein and serve the public interest by putting licensees on notice of the exact application modification procedures well prior to the May 1, 1996 deadline for submission of modification applications.

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PETITION FOR PARTIAL RECONSIDERATION OR CLARIFICATION

Incom Communications Corporation ("ICC"), SEA, Inc. ("SEA"), In Touch Services, Inc. ("In Touch"), Philip Adler dba Communications Management Company ("Adler"), and AirCom Communications, Inc. ("AirCom") (jointly referred to herein as "Petitioners"), by their attorneys and pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), hereby submit this Petition for Partial Reconsideration or Clarification of certain actions taken by the Commission in the Second Report and Order, FCC 96-27, released January 26, 1996 ("2nd R&O").

I. Standing

ICC, SEA, In Touch, Adler and AirCom are all engaged in the business of managing and operating local 220 MHz stations. All of the Petitioners own and/or manage constructed, operational 220 MHz facilities and all of them are currently offering for-profit 220 MHz service to the public. Both ICC and SEA have developed wide area 220 MHz systems serving metropolitan areas throughout the United States. In Touch has focused on developing a multi-station, wide-area 220 MHz system to serve the Atlanta metropolitan area and Adler has initiated a multi-station, wide-area 220 MHz system in the Philadelphia, Pennsylvania market, while AirCom is operating its 220 MHz SMR service from stations located in the New York City vicinity. SEA, ICC and Adler are all 220 MHz station licensees as well. As the Commission is aware, SEA is also the leading manufacturer of narrowband linear modulation wireless equipment used in voice and data on the 5 kHz wide channel allocations in the 220-222 MHz band. ICC and SEA have participated throughout the rulemaking process in the instant proceeding by attending meetings with Commission staff and filing comments and reply comments.

The Petitioners herein seek reconsideration or clarification of three facets of the Commission's decision in the 2nd R&O. The business interests of all of the Petitioners will be substantially adversely impacted if the matters raised herein are not adequately resolved and thus the Petitioners have standing to file for the reconsideration or clarification sought herein.

II. Background

All of the Petitioners applaud the Commission's efforts toward resolving the license modification issues which have hamstrung the 220 MHz industry for nearly five years. The Petitioners are committed to facilitating the expeditious permanent licensing of numerous 220 MHz stations at modified sites in order to finalize their 220 MHz wide-area system configurations in a manner that maximizes service to the public. The delay in opening a modification window for 220 MHz systems has substantially hampered the industry's ability to develop and compete with other land mobile radio services. Thus, expeditious reconsideration or clarification of the few remaining issues regarding modification of 220 MHz stations will indeed benefit the industry and the public alike.

On August 29, 1995 the Commission released its Fourth Notice of Proposed Rulemaking, FCC 95-381, in the above-referenced proceeding.[1] By the Fourth Notice, the Commission sought comment on the adoption of regulations to permit existing 220-222 MHz licensees to seek modifications to their existing facilities. This modification opportunity was critical to the operations of numerous licensees and 220 MHz system managers nationwide who required the regulatory flexibility to locate alternative sites and to relocate stations into service configurations that responded to consumers'

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[1] Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, GN Docket No. 93-252, released August 29, 1995 ("Fourth Notice").

needs. Licensees in the 220 MHz service, unlike all other Part 90 licensees, had never had an opportunity to modify their authorizations. Because of the industry's critical need to relocate systems and because a December 31, 1995 construction deadline was in effect for 220 MHz licensees, an expedited notice and comment period was adopted for the Fourth Notice with Comments filed on September 13, 1995 and Reply Comments filed on September 27, 1995.

Despite the best efforts of the industry and the Commission to expedite resolution of the license modification issues raised in the Fourth Notice, there was insufficient opportunity for the Commission to issue an order sufficiently prior to the December 31, 1995 construction deadline and thus on November 1, 1995 the American Mobile Telephone Association ("AMTA") filed a letter with the Wireless Telecommunications Bureau ("WTB") requesting a limited extension of the 220 MHz service construction deadline. On December 15, 1995 the Commission released an Order in PR Docket No. 89-552 (DA-95-2490), temporarily extending the construction deadline for 220 MHz systems ("Extension Order"). Prior to the termination of the temporary extension of the station construction deadline set forth in the Extension Order, supra, the Commission, on January 26, 1996, issued the 2nd R&O which set in place permanent station construction deadlines and license modification parameters for 220 MHz licenses.

Upon release of the 2nd R&O, AMTA's 220 MHz Council met to review provisions of the 2nd R&O which required further

interpretation and guidance. On February 15, 1995, on behalf of the 220 MHz Council, AMTA submitted a letter to the WTB requesting clarification of eight distinct issues addressed in the 2nd R&O ("AMTA Letter"). By letter dated February 28, 1996, the Policy Division of the WTB responded to AMTA's request for clarification ("WTB Letter"). On February 29, 1996 representatives of AMTA's 220 MHz Council met with members of the WTB's Policy Division to review the information contained in the WTB Letter. As a result of that meeting it is believed that the few remaining issues in the 2nd R&O for which reconsideration is sought herein can, in fact, be clarified by the Commission staff pursuant to delegated authority utilizing administrative procedures. Such favorable staff action sufficiently prior to May 1, 1996 (the modification application filing deadline) would moot the reconsideration sought herein and eliminate any need for industry members to seek a stay of the May 1, 1996 deadline.

Reconsideration or clarification is sought on the following three issues:

1. STAs pending on January 26, 1996 for modification sites where the licensees had taken delivery of their transceivers prior to that date.

2. The processing procedure for waiver requests.

3. The relocation distance limitation applicable to licensees located within 8 kilometers of a DFA border who seek to relocate outside the DFA.

III. A Licensee Seeking Modification Pursuant To Section 90.753(c)(2) Of The Rules Should Be Required To Have Filed An STA Request Designating The Modified Site By January 26, 1996; However, Such STA Need Not Have Been Granted By That Date.

Because of the great length of time during which licensees in the 220 MHz service were prohibited from permanently modifying their station locations, the Commission determined that licensees who had invested the time and capital to build stations at modified sites and were operating at such sites pursuant to STAs, or who were in the process of constructing stations at STA sites, should be permitted to obtain permanent authorizations for those STA sites regardless of their location (subject to co-channel interference requirements). 2nd R&O at ¶15. Thus, in the 2nd R&O the Commission adopted special provisions for licensees who were either operating stations at STA locations by the January 26, 1996 release date of the 2nd R&O or who had ordered base station transceivers and taken delivery of those transceivers prior to January 26, 1996.

Paragraph 15 of the 2nd R&O provides that applicants who have obtained granted STAs and have constructed and are operational at the STA site prior to January 26, 1996 will be able to remain at the constructed STA site as long as they follow the application modification procedures established in Section III.D of the 2nd R&O. Paragraph 16 of the 2nd R&O also permits licensees that are in the process of constructing base stations at their STA sites to obtain permanent authorization for the STA sites by following the procedures for filing modification applications established in Section III.D of the 2nd R&O.

Appendix C of the 2nd R&O adds to the Rules new Section 90.753, "Conditions of License Modification". Section 90.753(c)(1) assumes that licensees who have constructed base stations and placed them in operation at the STA site on or before January 26, 1996 will in fact have obtained a granted STA for those sites prior to that date. (Otherwise operation at those sites would be in contravention of the Commission's rules.) However, Section 90.753(c)(2), which pertains to licensees that have taken delivery of base station transceivers on or before January 26, 1996, does not require that these licensees also have obtained granted STAs by that date. This class of licensees is required to obtain granted STAs for their sites, but the January 26, 1996 grant date is not mandated. Under the express wording of Section 90.753(c)(2) as set forth in Appendix C, these licensees are eligible to modify to their STA site if their STA request, designating the modification site, was pending at the Commission by January 26, 1996.

Petitioners agree wholeheartedly with the Commission's decision to provide special relief to those licensees who are either operating at STA sites or are in the process of constructing at STA sites, having taken delivery of equipment already. In fact, Petitioners believe that the 2nd R&O has adequately provided the appropriate relief. However, the WTB Letter setting forth the Policy Division's interpretation of this issue states that those licensees seeking license modification pursuant to Section 90.753(c)(2) must have also obtained a granted STA by January 26, 1996, in contradiction to the express wording of Section 90.753.

WTB Letter at pp. 4-5. This WTB Letter requirement is not set forth in either the 2nd R&O or the proposed new Rules, and as such Petitioners seek the instant clarification.

Petitioners, like the Commission, believe that it is necessary to draw a bright line so that licensees are clearly on notice as to their rights and obligations regarding modification of 220 MHz licenses. However, neither the 2nd R&O, nor the new Rule, nor the underlying policy foundation behind them calls for any requirement that licensees which have taken delivery of base station transceivers on or before January 26, 1996 must also have obtained an STA by that date. Such a requirement would be arbitrary, in that licensees who had taken delivery of equipment and applied for an STA before January 26, 1996 have in fact demonstrated their intent to construct at the STA site and have put substantial time, capital and effort into preparing for such construction. Moreover, the Commission's speed in processing one STA compared to another is out of the licensee's control and provides no basis for distinguishing them respecting modifications.

Months prior to delivery of equipment the licensee would have had to place an equipment order, arrange for delivery and payment and arrange for access to the site where the equipment was delivered. Thus, the Commission is assured that these are licensees who have demonstrated a bona fide intent to build and operate their station at the sites designated in their STA requests.

As a matter of industry practice it is common for preparatory construction work to be done prior to a licensee actually submitting an STA request to the Commission. An STA request is generally processed expeditiously by the Commission, it is one of the least time-consuming and chronologically last links in the station construction chain of events.[2] Thus, licensees who took delivery of transceivers prior to January 26, 1996 and whose STAs were pending at the Commission, but not granted on that date, have frequently devoted the same time and effort to the construction process as licensees whose STAs were granted by January 26, 1996 — their stations are constructed and they are waiting to flip the switch to become operational as soon as the pending STA is granted.

Therefore, as the 2nd R&O and new Rules are silent as to the date by which licensees who have taken delivery of transceivers must have obtained a granted STA, the fairest line of demarcation for licensees seeking modification pursuant to Section 90.753(c)(2) is that by January 26, 1996 such licensees must have filed an STA request with the Commission, designating their modification site. From a precedent standpoint, such an interpretation would be consistent with the Commission's prior action in affording relief in the form of primary site status to all pending 900 MHz applications filed as of August 9, 1994 rather than restricting

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[2] The STA site has to be located and site availability confirmed before the STA request can be submitted.

such relief only to those applications granted as of that date.[3] It would also be consistent with the Commission's recent decision to "freeze" the acceptance for filing of 929 MHz and 930 MHz applications, with the caveat that all such applications filed by that date will be processed.[4]

The clarification requested would not require a modification to the proposed Rule. Neither would it afford any special advantage to any class of licensees who could have rushed to file STAs directly before the January 26, 1996 deadline, because those licensees would also have to have arranged to take delivery of the base station transceiver equipment by January 26, 1996 -- simply having filed an STA request on or before January 26, 1996 would not be sufficient. Thus, the Commission is assured that only bona fide licensees intending to operate at their STA sites will be granted relief, which in fact are the licensees that the Commission intended to protect from undue harm.

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[3] *See* Order on Reconsideration in GN Docket No. 93-252, 10 FCC Rcd 1568 (1994). The Commission stated that its prohibition on the granting of secondary 900 MHz SMR authorization after August 9, 1994 -- the date of the adoption of the SMRS Third Report and Order -- "imposes a significant burden on 900 MHz incumbents who are presently building out systems and seeking to provide service to consumers." *See* paragraph 4 of the Order on Reconsideration. Likewise, denying a particular class of 220 MHz licensees the opportunity to have sites designated in pending STA requests converted to primary status would impose a significant burden on these incumbent 220 MHz licensees who are currently building out their stations at these sites and who have already taken delivery of their transceivers in anticipation of initiating service to the public.

[4] Notice of Proposed Rulemaking in WT Docket No. 96-18 and PP Docket No. 93-253 released February 9, 1996 at ¶144.

IV. A Request For Waiver of Section 90.753 Of The Rules May Be Accompanied By An Alternative Site Proposal (Which May Be The Licensee's Initially Authorized Site) Which Complies With Section 90.753 Of The Rules And At Which Construction Will Be Required Within 45 Days Of The Commission's Denial Of The Waiver Request.

Paragraph 11 of the 2nd R&O acknowledges that there will be situations which will require waiver requests of the 8 km/25 km maximum distance limitations set forth in Section 90.753 of the rules for 220 MHz licensees seeking site modifications. It specifically recognizes that there are certain situations where significant terrain differentials exist in close proximity to MTAs (such as Los Angeles and Seattle). In these cases, the 8 km/25 km distance limitations may limit licensees to significantly inferior sites than are available to provide service to substantially the same geographic area authorized pursuant to a licensee's initial application. In these cases, the Commission contemplated that such licensees would be permitted to seek a waiver of Section 90.753 of the Rules by providing the showings set forth therein.

In order to avail itself of the waiver procedure, however, a licensee must have assurance that it will not face license forfeiture if, in fact, its waiver request is ultimately denied. As such, the AMTA Letter suggested a waiver application procedure whereby a waiver request would include an alternative site proposal which complied with the Commission's Rules and that the licensee be given 45 days in which to construct at the alternative site in the event that the waiver request is denied. The WTB Letter rejected this proposal, indicating that by submitting a waiver request the

applicant was acknowledging that no alternative was available and therefore alternative showings would not be permitted. WTB Letter at p.4.

The 2nd R&O does not set forth the procedure for processing waiver requests and thus clarification on this issue is essential. It is submitted that waiver requests should appropriately contain an alternative site proposal which complies with the Rules and at which the licensee will construct if its waiver request is denied. This "alternative showing" procedure is utilized for all Public Mobile Services governed by Part 22 of the Rules, including the cellular telephone and conventional mobile phone services, and it has provided substantial Commission precedent for well over ten years.[5] Adoption of the same procedure herein would accommodate those licensees who believe they can substantially improve coverage to subscribers in the same service area as initially authorized by relocating to sites at higher elevations which are located outside the 8 km/25 km maximum distance limitations. In submitting such a waiver request, licensees should be required to make a commitment to the Commission that if the waiver request is denied, then construction at the alternative site proposed (which could be the initially licensed site) will be accomplished immediately. After denial of the waiver request the applicant requires certainty that

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[5] The Omnibus Budget Reconciliation Act of 1993 would appear to require the Commission to extend the Part 22 waiver standard to the 220 MHz service, since they are "substantially similar" services. *See* 47 U.S.C. §332.

it will have a reasonable opportunity (*i.e.*, 45 days) to carry out its commitment to construct at the alternate site.

The WTB Letter setting forth its interpretation of the 2nd R&O initially concluded that such alternative showings would be impermissible because in order to ask for the waiver in the first place no alternative site could be available. WTB Letter at p.4. This, however, was not the intent of the 2nd R&O, which recognized that alternative sites may be available, but that such sites may be considerably "inferior" to other sites which may be obtained through the waiver request process. Thus, the WTB Letter's position that no alternative site can be available does not reflect the intent of the 2nd R&O and should not be incorporated into the processing procedure for waiver requests.

The WTB Letter also presumes that if a waiver request is not granted, the license will be subject to automatic cancellation if construction at the original site did not occur by March 11, 1996. Such a draconian result will surely deter any licensee from seeking a waiver and thereby effectively eliminate the entire waiver processes contemplated by the 2nd R&O. This would suppress entirely licensees' attempts to locate significantly superior sites that can better serve the public in the same geographic area for which the licensee was originally authorized. The site elevation differentials in such metropolitan areas as Los Angeles, Salt Lake City and Atlanta, where the main population is centered in a basin overlooked by mountain ranges, has a significant impact on mobile radio operations.

Those licensees located at downtown metropolitan sites obviously intended to serve a core DFA population. As the Commission noted, urban sites in particular have become inaccessible in the five years since the 220 MHz applications were filed. 2nd R&O at ¶8. This, in large measure, is due to the explosion of competition for these limited sites from PCS, narrowband paging, wide-area 800 MHz SMR operators and other emerging mobile voice and data technologies.

Permitting licensees in DFAs with exceptional terrain characteristics to submit waiver requests to relocate from inaccessible or unsuitable center city sites to elevated sites outside the 8 km maximum relocation distance -- sites which, in fact, overlook the same general service area -- would serve the Commission's intent in the 2nd R&O. In order to implement the waiver process, clarification is required to provide that a licensee submitting such a waiver request need not have constructed at its initially authorized site by March 11, 1996, but in the event of Commission denial of the request it will be accorded a 45-day window to construct at the alternate site set forth in the waiver request. This "safety net" is required because it is impossible for any licensee to predict with 100% accuracy that the Commission will grant its waiver request. Adopting an interpretation of the waiver application process that effectively deters any licensees in markets such as these from seeking waivers is not the intent of 2nd R&O. Thus, clarification is required to preserve the opportunity for licensees to submit bond fide waiver

requests by providing that a license will not be subject to automatic cancellation in the event the Commission denies the waiver request.

V. A Licensee Whose Initially Authorized Site Is Located Inside A DFA Within 8 km Of The Perimeter, And Who Seeks To Modify To A Location Outside The DFA, Should Be Permitted To Move Its Site To A Maximum Of 25 km.

The 2nd R&O specifies that all applications for modification to relocate a station will be limited to no more than one-half the distance over 120 kilometers to a co-channel licensee's initial authorized base station. Further, within the 46 DFAs the maximum permitted move is 8 kilometers; outside the DFAs the maximum move permitted is 25 kilometers. 2nd R&O at ¶9. The 2nd R&O is silent as to which distance limitation governs licensees who are currently located no more than 8 kilometers inside the DFA and wish to move outside the DFA, with the total move being no more than 25 kilometers. In this instance, clarification is necessary to indicate that those licensees who are within 8 kilometers of a DFA perimeter and are seeking to move outside the DFA are governed by the 25 kilometer relocation limitation.

This clarification would be in keeping with the Commission's concern that licensees not be permitted to relocate toward the center of urban populations in an attempt to significantly change their initial service areas and cover greater populations. 2nd R&O at ¶¶ 5&8. Those licensees seeking to move outside a DFA are in fact moving away from the center of population. As such, they are unlikely to gain any increased population in their service area.

The AMTA Letter requested clarification of this issue (see AMTA Letter, Item 1 of Questions and Answers on 220 MHz Modifications). In responding, the WTB Letter indicated that it interpreted the language of the 2nd R&O to apply the 8 km limitation to all licenses within DFAs, even if the proposed relocation will result in the station being ultimately located outside the DFA. WTB Letter, pp.1-2. Such an interpretation is unnecessarily restrictive for those licensees whose optimal site lies outside a DFA and whose initially authorized site is within 8 km of the DFA border.

The 2nd R&O contemplates that the defining element of a proposed modification which crosses a DFA boundary would be the ultimate location of the station. Thus, a licensee with an initially authorized site outside a DFA who seeks to modify to a site within a DFA is limited to a move that is a maximum of 8 km inside the DFA. 2nd R&O at ¶9. Likewise, a licensee initially licensed inside a DFA within 8 km of the perimeter who seeks to relocate outside the DFA should be governed by the maximum relocation distance applicable to the station's ultimate destination, which is the 25 km standard. Thus, in order to afford licensees the maximum opportunity to locate optimal sites within the 8 km/25 km maximum distance limitations, reconsideration or clarification of this issue is required.

CONCLUSION

Reconsideration or clarification of the issues requested herein are essential to adequately define the appropriate implementation of the long awaited modification procedures for 220 MHz licensees. Resolution to the three matters raised herein can be accomplished within the four corners of the existing 2nd R&O and the rules promulgated pursuant thereto. As such, if sufficiently prior to the May 1, 1996 application modification deadline, the Commission can clarify the issues raised herein through administrative action and provide the licensees the minimal procedural and substantive guidance required so that their licenses are not jeopardized due to misinterpretation of the rules, then this Petition for Reconsideration will be moot.

All of the clarifications requested herein are in keeping with the concerns raised by the Commission and the industry in the lengthy dialogue that has surrounded adoption of the 2nd R&O. The voluminous comments and reply comments filed in this proceeding support the interpretations set forth herein and would support clarification of them as expeditiously as possible pursuant to staff action.

Therefore, it is respectfully requested that the Commission reconsider or clarify the 2nd R&O in order to provide as follows:

1. A licensee seeking modification pursuant to Section 90.753(c)(2) must certify that on January 26, 1996 it had an STA request granted or pending before the Commission designating the modified site.

2. A request for waiver may be accompanied by an alternative site proposal (which may be the licensee's initially authorized site) which complies with Section 90.753 of the Rules and at which construction will be required within 45 days of the Commission's denial of the waiver request.

3. A licensee whose initially authorized site is located inside a DFA within 8 km of the DFA perimeter, and who seeks to modify to a location outside the DFA, will be permitted to move its site to a maximum of 25 km.

Respectfully submitted,

INCOM COMMUNICATIONS CORPORATION
SEA, INC.
IN TOUCH SERVICES, INC.
PHILIP ADLER dba
COMMUNICATIONS MANAGEMENT COMPANY
AIRCOM COMMUNICATIONS, INC.

By: _____
Robyn G. Nietert

By: _____
David J. Kaufman

Their Attorneys
Brown Nietert & Kaufman, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(202) 887-0600

March 4, 1996

CERTIFICATE OF SERVICE

I, JacLyn Freeman, a secretary at the law firm of Brown Nietert & Kaufman, Chartered, do hereby certify that I caused a copy of the foregoing "Petition for Partial Reconsideration or Clarification" to be hand delivered this 4th day of March, 1996 to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

Ms. Michele C. Farquhar
Chief, Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, DC 20554

John Cimko, Chief
Policy Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, DC 20554

*Jill M. Lynon
American Mobile Telecommunications Assoc.
1150 18th Street, N.W.
Suite 250
Washington, DC 20036

JacLyn Freeman

* U.S. Mail